Supreme Court, U.S.
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No. 99 - 728

In the
Supreme Court of the United States

CENTRAL MAINE POWER COMPANY,
Petitioner,
v.
MAINE PUBLIC UTILITIES COMMISSION,
Respondent.

On Petition for Writ of *Certiorari* to the
Maine Supreme Judicial Court

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

1. Whether a State administrative rule that compels a utility to disseminate the regulator's core speech, including "corrections" to the utility's own protected core speech, and that permits the regulator to enjoin the utility's core speech, violates the First and Fourteenth Amendments?

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BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIÆ*

The New England Legal Foundation ("NELF"), a non-profit, public interest law firm, was incorporated in 1977. Its membership consists of individuals, businesses, and others who believe in promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses from all parts of New England and the United States. NELF has regularly appeared in state and federal court, as party or counsel, in cases raising issues of general economic significance to the business community. *See, e.g., UNUM Life Ins. Co. v. Ward,* 119 S. Ct. 1380 (1999); *Lockheed Corp. v. Spink,* 517 U.S. 882 (1996); *BMW v. Gore,* 517 U.S. 559 (1996); *Reich v. Southern*

New England Telecommunications Corp., 121 F.3d 58 (2d Cir. 1997); *Cigna Health Plan of Louisiana v. Louisiana*, 82 F.3d 642 (5th Cir. 1996); *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996); *Conservation Law Foundation v. Department of the Air Force*, 79 F.3d 1250 (1st Cir. 1996); *Preseault v. United States*, 66 F.3d 1167 (Fed. Cir. 1995); *Eastern Mountain Platform Tennis, Inc. v. Sherwin-Williams Co.*, 40 F.3d 492 (1st Cir. 1994); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992); *International Paper Co. v. Town of Jay*, 665 A.2d 998 (Me. 1995); *O'Brien v. New England Telephone & Telegraph Co.*, 422 Mass. 686, 664 N.E.2d 743 (1996).

Amicus seeks to bring to the Court's attention its views, and those of its supporters, concerning the important issues raised by this Petition involving the free speech rights of both electric utilities and consumers in Maine to receive unfettered information from the electric utilities. NELF is particularly concerned about the chilling effect this decision could have on other businesses and consumers across the country. *Amicus* believes that this brief may provide an additional perspective which may aid the Court in determining whether to grant the petition for a writ of *certiorari*.[1]

Pursuant to Supreme Court Rule 37.2, counsel for *Amicus* has secured written consent for the filing of this brief from counsel for Petitioner and Respondent.

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1 Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that counsel for neither Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the Brief of the Petitioner, Central Maine Power Company ("CMP").

ARGUMENT

THIS COURT SHOULD GRANT THE PETITION TO ENSURE THE CONTINUED VITALITY OF FUNDAMENTAL FIRST AMENDMENT FREEDOMS.

CMP's Petition challenges the constitutionality of section 6(C) of Chapter 302 of the PUC administrative rules which permits the PUC, among other things, to order a public utility responsible for providing transmission and distribution services ("T & D") to correct educational material that the PUC finds to be "misleading, deceptive or inaccurate" and to disseminate the "corrected" material to consumers. Despite CMP's contention that this regulation is an unconstitutional content-based restriction, the Maine Supreme Judicial Court accepted the PUC's argument that it has a compelling interest in "work[ing] with [T&D facilities] to ensure consumers get information that is objective, accurate and consistent with [the Commission's consumer education] program messages." (Alterations by the Court; emphasis added). This holding is erroneous and should be addressed by this Court.

The Maine Supreme Judicial Court recognized that CMP's speech designed to educate the public about energy restructuring is core, non-commercial speech and recognized that "in effect, the [PUC] does not want any speech to go to consumers unless it is speech with which [it] agrees." Despite this finding, the court held that the challenged regulations met the strict scrutiny test for upholding content-based restrictions and held that the regulations were narrowly tailored to serve a

compelling state interest -- avoiding consumer confusion.[2] In essence, the court held that avoiding "confusion" that might be generated by a T&D's non-commercial core speech is a compelling governmental interest.

For the reasons set forth herein and in CMP's Petition, this Court should grant the Petition and reverse the decision below and hold that a state administrative rule that compels a utility to disseminate the regulator's core speech, including "corrections" to the utility's own protected core speech, and that permits the regulator to enjoin and "correct" the utility's core speech violates the First and Fourteenth amendments. Although NELF fully supports all of the arguments raised by the Petitioner, NELF's *amicus* brief will focus on the policy implications of this decision on fundamental First Amendment rights of free speech.

A. CORE SPEECH IS ENTITLED TO THE GREATEST PROTECTION UNDER THE FIRST AMENDMENT.

The PUC's regulations restrict core speech and, therefore, are subject to the "most exacting scrutiny" even when the speaker is a regulated utility. *Consolidated Edison v. Public Service Comm. of New York*, 447 U.S. 530, 540 (1990). In order to constitutionally restrict core speech, the government must demonstrate that its restriction "is a precisely drawn means of serving a compelling state interest." *Id.* Contrary to the holding of the Maine Supreme Judicial Court, the PUC's

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2. The court also concluded that "the alternative of directly mailing its education materials to consumers would hinder the Commission's achievement of its interests because it would increase the possibility of consumers receiving differing information from different sources."

alleged interest in avoiding confusion about electric restructuring (by mandating that all speech conform to the PUC's version) is not a compelling state interest. As this Court has held:

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 579 (1995)(emphasis added).

Furthermore, the First Amendment prohibits the PUC from censoring CMP's core speech in order to avoid confusion. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). "The First Amendment rejects the 'highly paternalistic' approach of statutes . . . which restrict what people may hear." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n. 31 (1978). *See also Consolidated Edison*, 447 U.S. at 541-42. "To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988). "The First Amendment mandates that we presume that speakers, not government, know best what they want to say and how to say it." *Id.*, at 79-92.

Clearly, the PUC has failed to choose a narrowly tailored,

least restrictive means of advancing its asserted governmental interest. If the PUC is concerned that CMP's core speech will cause confusion, its constitutional remedy is to respond to CMP's speech with more speech of its own. *See Bellotti*, 435 U.S. at 785-86.

B. THE PUC REGULATION UNCONSTITUTIONALLY INFRINGES UPON THE PUBLIC'S RIGHT TO RECEIVE INFORMATION.

The decision of the Maine Supreme Judicial Court infringes not only on the rights of the electric utilities to disseminate information but also on the rights of consumers to receive it. Supreme Court precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to the discussion, debate, and dissemination of information and ideas." *Board of Education v. Pico*, 457 U.S. 853, 866-67 (1982) (citations omitted). Consequently, this Court has recognized that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Id.* In keeping with this principle, this Court has held in a variety of contexts that "the Constitution protects the right to receive information and ideas. . . . This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution." *Id.* Central to the constitutional protection afforded speakers who wish to enter the marketplace of ideas is the recognition that the First Amendment also "protects the public's interest in receiving information." *Pacific Gas & Electric* Co., 475 U.S. 1, 8 (1986). The Maine Supreme Judicial Court itself acknowledges that the right to receive information is an inherent component of the guarantee of free speech. *See Solmitz v. Maine S.A.D. No. 59*, 495 A.2d 812, 818-19 (Me. 1985); *Brophy v. Town of Castine*, 53 A.2d 663, 664 (Me. 1987).

One of the critical considerations in First Amendment jurisprudence is whether a state's restriction on speech "limit[s] the range of information and ideas to which the public is exposed." *Id.* With respect to the public's fundamental interest in receiving a broad spectrum of available knowledge, the danger in the PUC approach to consumer education is clear. Each of the PUC restrictions seeks to limit the information available to the public to a government approved message that is tantamount to a form of enforced propaganda. In effect, the PUC regulations prevent consumers from receiving any information from T & D utilities on the topic of electric utility restructuring and retail access that is inconsistent with the PUC's viewpoint. Such an approach is fundamentally at odds with basic notions of democracy. "Our Constitution does not permit the official suppression of ideas." *Pico,* 457 U.S. at 449. *See, e.g., Consolidated Edison v. Public Service Comm. of New York*, 447 U.S. 530, 535 (1980), *Brown v. Board of Regents*, 640 F. Supp. 674, 678 (D. Neb. 1986).

NELF is particularly concerned about the far-reaching ramifications of the Maine Supreme Judicial Court's decision and its chilling effect on the First Amendment rights of both businesses and consumers alike. The Maine Supreme Judicial Court's decision impermissibly restricts the First Amendment rights of all regulated industries and implicates the Free Speech of all business entities who might "confuse" the public by disseminating core, non-commercial speech. In effect, the more complex or sensitive the information the more likely the government will attempt to restrict opposing viewpoints. There can be no legitimate basis for the government to flatly exclude a knowledgeable source of information from public debate on issues of interest and concern to the general public. Such governmental censorship flies in the face of the fundamental democratic principles underlying our system of government.

> A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors, must arm themselves with the power with which knowledge gives.

9 Writings of James Madison 103 (G. Hunt ed 1910). *See also* A. Meiklejohn, Free Speech and its Relation to Self Government 26 (1948) ("Just so far as...the citizens who are to decide an issue are denied acquaintance with information on doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good.").

This Court should grant CMP's Petition and reaffirm its previous position that when the underlying state motivation is to limit speech based on what the state finds agreeable, the public's countervailing interest in receiving a free flow of information is irreparably damaged. *Pico*, 457 U.S. at 871. Implicit in the PUC's paternalistic regulatory approach is the unpalatable notion that consumers are not intelligent enough to gather and process all available and conflicting facts to make a rational decision. It is not the role of the PUC to determine for the public what information is accurate, it is for the public to decide, armed with a broad spectrum of knowledge. The PUC regulations prevent access to ideas with which the PUC disagrees thereby significantly infringing upon the rights of the consuming public to receive information.

Clearly, this is abhorrent to free speech principles which presume that more information ultimately leads to informed decision-making. Debate, not censorship should prevail. This

Court should take this opportunity to make clear that such paternalistic, suppressive conduct is unconstitutional.

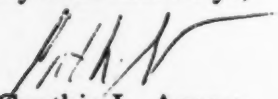
CONCLUSION

For the reasons stated above, and in CMP's Petition for a Writ of *Certiorari*, this Court should preserve the First Amendment rights of all businesses and individuals alike by granting the Petition.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By their attorneys,



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